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3. *Indemnity.*—In an action upon a covenant to indemnify and save harmless from liabilities, the plaintiff can only recover such damages as he shows he has actually sustained.—Ewing et al. v. Reilly et al., 113.

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2. *Practice—Writ of Error.*—A writ of error does not lie from the Circuit Court to the County Court, or court having probate jurisdiction, with respect to matters exclusively of a probate character. The proper remedy is by an appeal taken in accordance with the statute. (R. C. 1855, p. 1295, § 2.)—North Missouri Railroad Co. v. Green's Adm'r, 159.
3. *Judgment—Securities.*—Where the administrator and his securities on his official bond are proceeded against under the provisions of secs. 14 and 15, of Art. V. of the administration act, (R. C. 1855, p. 162,) for the refusal of the administrator to pay money in accordance with the order of the County Court, the defendants cannot be permitted to show that the administrator had no funds in hand applicable to the demand. The administrator is bound by the judgment of the County Court, and its action cannot be controverted in any collateral proceeding. The securities are also precluded by the conditions of the bond executed by them. (State to use of Griffith v. Holt, 27 Mo. 340, affirmed.)—Taylor v. Hunt's Ex'r et als., 205.

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2. *Judgment.*—The statute permitting assignments of judgments to be made upon the record applies only to judgments rendered by the courts of this State. The assignment of a judgment recovered in another State may be proven by a written instrument transferring to the plaintiff the equitable interest in the debt, and he may sue upon it in his own name.—Baker v. Stonebraker's Adm'r, 172.
3. *Agent—Payment.*—A, having a suit pending against B, made an assignment of so much of the proceeds as would satisfy a debt due by himself to C. B, after having received notice of the assignment, compromised with A and paid the money to the attorney of A, who applied the same according to the directions of A. *Held,* that although C had a right to control the suit, the attorney employed by A was not the agent of C, and that the sum paid was not a payment to C. (Ashby v. Winston, S. C., 26 Mo. 210.)—Ashby v. Winston et als., 311.

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3. *Sheriff.*—The act of 1855, concerning the duties of marshal and sheriff in St. Louis county, (Acts 1855, p. 464, § 1,) only provides for claims to be filed by parties other than the defendant.—State, to use of Clay, v. Burtis et al., 92.

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5. *Fraudulent Conveyance.*—In an attachment brought on the ground that defendant had fraudulently conveyed his property and effects, it must be shown that the conveyance was made for a fraudulent purpose or with fraudulent intent; it is not sufficient that the effect of the conveyance was to delay creditors.—Spencer v. Deagle, 455.

6. *Delivery Bond—Practice.*—Where a debtor gives bond for the delivery of the property attached, when and where the court may direct, the order of the court directing the defendant to deliver the property to the sheriff need not specify any place of delivery. The security on the bond is not entitled to any notice of the order of court, nor to have a demand made upon him for the delivery of the property. (R. C. 1855, p. 247, § 29, 30, & p. 256, § 57, 58.)—Weed v. Dills et al., 483.

B

BANKS AND BANKING.

1. *Constitution.*—The act of the General Assembly of March 2, 1857, (Sess. Acts 1856–7, p. 14,) creating banks and branch banks, is not in violation of the constitutional provision forbidding the creation of more than ten banks. —Farmers' Bank v. Garten et al., 119.
2. *Forfeiture.*—A debtor sued by one of the banks of this State cannot plead, in bar of the suit, that the bank has suspended payment of its liabilities in specie, and has thereby forfeited its charter by virtue of the provisions of § 9, art. 1, of the act of incorporation. (Sess. Acts 1856–7, p. 17.) Such a forfeiture can only be enforced by the State in a direct proceeding for that purpose.—*Id.*
3. *Defence.*—A debtor to a bank cannot plead, as a defence to a suit by the bank, that it has refused to redeem its five-dollar notes in coin; or that it has not kept in its vaults the amount of coin required by its charter. Such violations of the law cannot be inquired into collaterally, but only by some direct proceeding on the part of the State.—*Id.*
4. *Interest.*—Merchants' Bank v. Sassee, 33 Mo. 350, affirmed. The banks of this State may, in discounting paper payable out of the county, charge a premium for exchange, without being guilty of usury.—*Id.*
5. *Illegal Banking.*—The banks chartered by this State are not subject to the provisions of the statute against illegal banking (R. C. 1855, p. 286, by passing the notes of the other banks of the State, although they have suspended specie payments. (Bates, Judge, dissenting.)—*Id.*

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1. *Bills and Notes.*—The endorsee of a bill or note even with notice takes the instrument, subject only to such defences and equities as attach to the instrument itself. That a corporation endorsing a note had violated the provisions of the act concerning illegal banking, R. C. 1855, sec. 4 and 5, by receiving and passing the notes of nonspecie-paying and foreign banks, does not affect the note itself, but is a defence only when the party is sued by the corporation.—Mattoon v. McDaniel, 138.

BILLS OF EXCHANGE AND NEGOTIABLE NOTES.

1. *Interest.*—A note for a certain sum, "with ten per cent. interest thereon till paid," carries interest from date. (Ayres v. Haines, 13 Mo. 252, qualified and explained.)—Pitzer's Adm'r v. Barret et al., 84.
2. *Endorser.*—A party endorsing a blank note cannot, as against an endorsee for value without notice, object that the blanks have been filled contrary to the agreement made between the parties.—Farmers' Bank v. Garten et al., 119.
3. *Illegal Banking.*—The endorsee of a bill or note even with notice takes the instrument, subject only to such defences and equities as attach to the instrument itself. That a corporation endorsing a note had violated the provisions of the act concerning illegal banking, R. C. 1855, § 4 & 5, by receiving and passing the notes of nonspecie-paying and foreign banks, does not affect the note itself, but is a defence only when the party is sued by the corporation.—Mattoon v. McDaniel, 138.

BILLS OF EXCHANGE AND NEGOTIABLE NOTES—*Continued.*

4. *Evidence.*—Where there have been mutual accounts between parties, the giving of a note by one to the other is *prima facie* evidence of a settlement of accounts between them.—Kinman v. Cannefax, 147.
5. *Endorser—Securities.*—That the endorser of a negotiable note, for whose accommodation the note was made, had placed securities in the hands of the maker to meet the liability, is no defence, even in equity, to a suit by the holder against the endorser, after his liability has been fixed by demand and notice.—Dougherty v. Mackenzie's Adm'x, 462.
6. *Notice to Endorser.*—A notice to an endorser of a negotiable promissory note, describing the note, and stating that the note has matured and not been paid, and that the holder looks to the endorser for payment, with interest, damages, and costs, is sufficient notice of dishonor, without alleging demand of payment from the maker.—Wolf's Exec'x v. Lauman, 575.

BOATS AND VESSELS.

1. *Charter Party—Loss.*—In a charter party of a boat to run on the Missouri river, it was stipulated that "in case of loss the boat should be at the risk of the owners;" *held*, that the loss contemplated was not the total destruction of the boat, but such a loss as would entirely defeat the object of the contract, the running of the boat.—Goddin v. Welton et al., 448.
2. *Covenant.*—A. sold to B. a part interest in a steamboat, and covenanted to put B. in possession and command of the boat as captain. A. put B. in possession and command, but subsequently B. was removed from his command by the other owners, and another person placed in charge. In a suit upon the covenant by B. against A., *held*, that A. was not bound to maintain B. in his command of the boat.—McKee et al. v. Kinney, 125.
3. *Transportation.*—The statute, R. C. 1855, p. 304, § 1, s. d. 4, gives a lien upon a boat for damages arising from the non-performance or mal-performance of a contract for towing.—Miles et als. v. S. Bt. Diurnal, 588.

BONDS, NOTES, AND ACCOUNTS.

See ASSIGNMENT, 1, 5. ACCOUNT.

C

CONFLICT OF LAWS.

See DOMICIL, 1.

CONSTITUTION.

1. *Banks.*—The act of the General Assembly of March 2, 1857, (Sess. Acts 1856-7, p. 14,) creating banks and branch banks, is not in violation of the constitutional provision forbidding the creation of more than ten banks.—Farmers' Bank v. Garten et al., 119.
2. *Practice.*—The act of May 15, 1861, forbidding the commencement of suits against all persons in the actual military service of the State, and requiring suits already commenced to be continued, is not in violation of that clause of the Constitution of this State forbidding all laws retrospective in their operation, where the cause of action originated after the passage of the law; nor is such an act void, as being a denial or delay of justice. Where, therefore, the defendant sued upon a note made after passage of the act,

CONSTITUTION—*Continued.*

pleaded that at the commencement of the suit he was in the service of the State and asked to have the suit dismissed, it was error in the court to strike out that portion of the answer. The issue should have been tried, and if found true, the suit should have been dismissed.—Bruns et al. v. Crawford et al., 330.

3. *Salaries—Ordinance.*—The ordinance of the Convention of October 16, 1861, reduced the salaries of the officers therein named, for the year ending September 1, 1862. The reduction was absolute, and not a mere withholding for a time of a portion to be made up afterwards.—State, *ex rel.* Miller, v. Auditor, 503.

4. *State—County—City of St. Louis—Revenue.*—The moneys acquired by a county from the taxation of its citizens is not the private property of the county, and an act of the General Assembly directing the county to appropriate part of its funds to pay a portion of the police expenses of a city situated within its limits is not an application of property to private uses, and is not the taking of private property to public uses without compensation, the Police Commissioners being an agency of the State Government and performing public duties.—State, *ex rel.* Police Commissioners, v. St. Louis County Court, 546.

5. *State—County—Revenue.*—1. An act directing the county to appropriate part of its revenue, already collected, in a particular way, is not unconstitutional, as being retrospective in its operation. It takes away no vested right, nor does it impair the obligation of contracts. The acts of the Legislature providing the objects for which county funds could be appropriated are at all times subject to repeal or alteration, so as to appropriate the funds in a manner, or to objects, different from those before provided. 2. Such act does not violate the principles of taxation laid down in the Constitution. (Hamilton & Treat v. St. Louis County, 15 Mo. 3, affirmed.) 3. A county is not a private corporation, but an agency of the State Government; and while the Legislature cannot take from the county its property, it has full power to direct the mode in which the property shall be used for the benefit of the county.—*Id.*

CONTRACTS.

1. *Action.*—Sub-contractors, not contracting with the owner of a building, but with the person with whom the owner agreed for the construction, are not liable to the owner in an action for negligently and unskilfully doing their work, by which the owner is injured. There is no privity of contract. The action must be brought against the principal contractor.—Bissell v. Roden et al., 63.

2. *Servant.*—If a servant contract to serve for a year, and leave the employment of his master before the expiration of the time, and without sufficient cause, he cannot recover upon the contract. A disagreement between himself and his fellow-servants is not a sufficient cause for leaving his master's service.—Aaron v. Moore, 79.

3. *Sale.*—The plaintiff suing for the purchase money of land sold and conveyed, must show as a condition precedent to a recovery that he had conveyed or caused to be conveyed to the purchaser the title or interest sold.—Huffman v. Ackley, 277.

CONTRACTS—*Continued.*

4. *County Court—Agent.*—The County Court can only bind the county by doing things which the law authorizes to be done; but if the law authorizes the court to have work done, the obligation to pay for the work when done follows necessarily.—Copp v. St. Louis Co., 383.
5. *Evidence.*—But where the contract was implied from the circumstances of the case, and the party doing the work was in the employment of a third party by whom he was directed to do the work, it was error to exclude from the jury the evidence that he was directed by such third party to do such work without charge.—*Id.*
6. *Consideration.*—Any injury or inconvenience to the promisee is as sufficient a consideration to uphold a promise, as any benefit or advantage arising to the promisor.—Carr et al. v. Card et al., 513.
7. *Judgment—Joint Contractors.*—A judgment against two of several joint debtors is no bar to a suit against the others.—Caldwell's Assignee v. Fitzpatrick et al., 276.
8. *Statute of Frauds—Consideration.*—A promise to pay the debt of another, although in writing, must be founded upon a sufficient consideration.—Cook v. Elliott, 586.
9. *Damages.*—Where one party undertakes for a valuable consideration to furnish another with an abstract of title, or statement of the conveyances and encumbrances affecting a tract of land, and incorrectly reports the quantity of land previously conveyed, he will be liable to respond in damages to the party who, relying upon such information, purchases the land.—Clark et al. v. Marshall et al., 429.

CONVEYANCES.

1. *Dower.*—Thomas v. Meier, 18 Mo. 573, affirmed. — Thomas v. Hesse et al., 13.
2. *Dower.*—If the husband sell the land without the relinquishment of dower by the wife, she will be endowed in accordance with the law in force at the time of the husband's conveyance. Under the statutes of 1825, the wife is not barred by the fact that the husband owed debts at the date of his deed or time of his death, unless the claims of the creditors be properly enforced. A third person cannot set up the debt as a bar to the action for dower.—*Id.*
3. *Covenant—Encumbrances—Revenue.*—The covenants contained in the words "grant, bargain and sell" in a conveyance of land, is a covenant against the encumbrances caused by the taxes assessed to the owner of the land at the date of the assessment. The statute (R. C 1855, p. 1320, § 18) requires lands to be assessed in the name of the person owning the land on the 1st day of February in each year; if the owner, therefore, convey the land after that date, he is liable upon his covenant against encumbrances for the tax assessed for the year.—Blossom v. Van Court, 390.
4. *Alteration.*—Where title has passed by a deed, no subsequent alteration of the conveyance, by any one, for any purpose, can revest the grantor with the title.—Alexander et al. v. Hickox et al., 496.
5. *Description.*—Register's deed declared void for uncertainty of description.—*Id.*

CONVEYANCES—*Continued.*

6. *Description—Execution—Sheriff's deed.*—The sheriff sold and conveyed under execution a tract of land, describing it as a tract of land situate about six miles north-westwardly from the city of St. Louis, on the River des Peres, containing fifteen hundred arpens, more or less, being part of a tract of eighteen hundred arpens granted to James McDaniel, Feb. 1, 1798, &c., and adjoining land granted to Mary L. Papin; *held*, that the deed was void for uncertainty of description; but had the land been conveyed by the defendant in the execution, by the same description, the deed might have passed either all the interest of the grantor in the tract, or fifteen hundred parts in eighteen hundred. *Held*, farther, that the evidence did not give certainty to the description in the sheriff's deed.—Clemens v. Rannells et al., 579.

CORPORATIONS.

1. *By-laws.*—A corporation authorized by its charter to make such by-laws as may be necessary to attain its objects, may also amend and change such by-laws so as to affect the rights of the stockholders under the previous by-laws.—Shrick v. St. Louis Mut. House Building Co., 423.
2. *Personal Ltabiltty of Directors—Debts.*—The debts for which the directors are held liable under R. C. 1845, § 26, p. 234, are the debts voluntarily created by the directors. A judgment against the corporation for damages for a loss of a steamboat, through the negligence of the agents and servants of the company, is not one of the debts contemplated by the statute. (Cable et als. v. McCune et als., 26 Mo. 371, affirmed.)—Cable et al. v. Gaty et al., 573.

CORPORATIONS, MUNICIPAL.

See CONSTITUTION, 3, 4.

1. *Assessments for Improvements—Powers, compliance with—Special Tax.*—In a proceeding by a municipal corporation, under its charter and ordinances, to levy a special tax or collect an assessment upon a lot owner to pay for the opening or improving of an adjoining street, it is not necessary for the corporation to show a strict compliance with all the ordinances directory upon the subject; but the owner of a lot assessed may show any neglect of duty which has worked an injury to himself. (City of St. Joseph v. Anthony, 30 Mo. 537, P. 2, affirmed.)—Risley v. City of St. Louis, 404.
2. *City of St. Louis—Charter—Proceedings to assess Special Tax.*—1. The charter of the city of St. Louis, approved March 14, 1859, repealing the act of incorporation of February 23, 1853, does not affect proceedings commenced under the prior charter of 1853, to assess a special tax upon lot owners to pay for the improvement of an adjoining street. 2. The act of February 23, 1853, requires notice by publication of the proceedings for assessing such special tax to be given only to the persons to be benefitted by the contemplated improvement. 3. It is not necessary that the different adjournments of the jury, empannelled to assess the damages and benefits for the contemplated improvements, should appear of record. 4. The fact that there was no money in the city treasury to meet the appropriation made by the city council to pay the amount assessed against the city, cannot avail a lot owner against whom the special tax is assessed.—*Id.*

CORPORATIONS, RAILROAD.

1. *Damages—Negligence.*—A party suing a railroad corporation for the killing of stock, must allege that the injury complained of was committed negligently or wilfully, or state the facts from which the law raises the inference of negligence or wilfulness. If these facts are not stated, the petition will be fatally defective on motion in arrest. (Quick v. Hannibal & St. Jo. R.R., 31 Mo. 399; Brown v. same, 33 Mo. 309, affirmed.)—Dyer v. The Pacific R.R., 127.
2. *Negligence.*—A petition against a railroad company for killing stock must either allege that the injury was caused by the negligence or wilfulness of the defendant, or set forth such facts as show that it is liable under the statute, R. C. 1855, p. 649, § 5, "Damages," which is equivalent to the allegation of negligence. (See Brown v. Han. & St. Jo. R.R., 33 Mo. 309.)—West v. Han. & St. Jo. R.R. Co., 177.
3. *Pleading.*—A petition against a railroad company which states that the defendant, whilst running its locomotive, &c., negligently, struck the cattle of the plaintiff, &c., shows a good cause of action at common law.—Garner v. Han. & St. Jo. R.R. Co., 235.
4. *Action—Negligence.*—In an action against a railroad company for negligently killing stock, the plaintiff must prove actual negligence, or such facts as impose a liability under the statute. (R. C. 1855, p. 649, § 5)—Calvert v. Han. & St. Jo. R.R. Co., 242.
5. *Pleading.*—In a suit against a railroad corporation for the transporting a slave without the consent of his owner, it must be averred in the petition that the defendant is a railroad corporation in this State. (Local Acts 1855, p. 169.)—Welton v. Pacific R.R., 258.
6. *Highway.*—Lackland v. North Missouri Railroad, 31 Mo. 181, affirmed.—Lackland, Adm'r, v. N. Missouri R.R. Co., 259.
7. *Highways—Nuisance.*—A railroad having the right to use a public highway for the ordinary purposes of a railroad as a means of travel and transportation, is responsible to adjoining proprietors only for using it in an illegal manner.—*Id.*

COURTS.

See JURISDICTION.

1. *Practice—Writ of Error.*—A writ of error does not lie from the Circuit Court to the County Court, or court having probate jurisdiction, with respect to matters exclusively of a probate character. The proper remedy is by an appeal taken in accordance with the statute. (R. C. 1855, p. 1295, § 2.)—North Missouri Railroad Co. v. Green's Adm'r, 159.
2. *Kansas City Criminal Court.*—The act of March 23, 1863, entitled "An act authorizing the holding of a criminal court in the city of Kansas," is not a criminal law to be strictly construed, and establishes and gives jurisdiction to the "Kansas City Criminal Court."—State v. Ross, 336.

COVENANT.

See ACTION, 3.

1. *Boats and Vessels.*—A. sold to B. a part interest in a steamboat, and covenanted to put B. in possession and command of the boat as captain. A. put

COVENANT—*Continued.*

B. in possession and command, but subsequently B. was removed from his command by the other owners, and another person placed in charge. In a suit upon the covenant by B. against A., *held*, that A. was not bound to maintain B. in his command of the boat.—McKee et al. v. Kinney, 125.

2. *Evidence—Damages.*—In a suit upon the covenants of a deed upon a failure of title to part of the lands conveyed, a memorandum made by the grantors in the deed, showing the different tracts conveyed and the price per acre at which the lands were sold, which memorandum was by the defendants handed to the conveyancer as showing the lands sold and the consideration paid per acre therefor, is properly admitted in evidence, to show the damage sustained by the grantee.—Guinotte v. Chouteau et al., 154.
3. *Encumbrances—Revenue.*—The covenants contained in the words "grant, bargain and sell" in a conveyance of land, is a covenant against the encumbrances caused by the taxes assessed to the owner of the land at the date of the assessment. The statute (R. C. 1855, p. 1320, § 18) requires lands to be assessed in the name of the person owning the land on the 1st day of February in each year; if the owner, therefore, convey the land after that date, he is liable upon his covenant against encumbrances for the tax assessed for the year.—Blossom v. Van Court, 390.

CRIMES.

See CRIMINAL PRACTICE.

1. *Judgment.*—The statute of this State which suspends all the civil rights of a party sentenced to the penitentiary for a term less than life, applies only to sentences by the State Courts.—Presbury v. Hull, 29.
2. *Burglary.*—The breaking into a dwelling-house, with intent to steal, is a burglary, although there be no one in the house at the time. (R. C. 1855, p. 573, § 11.)—State v. Meerchouse, 344.
3. *Felonious Assault.*—In an indictment for a felonious assault under sec. 35, p. 565, R. C. 1855, the omission to state in the indictment that the assault was made *on purpose*, and of *malice aforethought*, is a fatal defect for which the judgment should be arrested.—State v. Harris et al., 347.

D

DAMAGES.

1. *Negligence.*—In an action against a carrier, under the statute for the better security of life, &c., (1 R. C. 647,) if the deceased was killed by reason of his voluntarily taking an improper or dangerous position by which he lost his life, the carrier is not liable. (Dryden, J., dissenting.)—Huelsenkamp v. Citizens' Railway Co., 45.
2. *Negligence—Collision.*—In action for damages arising from a collision of boats, if the negligence of both parties contributed to the accident, there can be no recovery.—Galena, Dunleith and Minnesota Packet Co. v. Vandergrift et al., 55.
3. *Indemnity.*—In an action upon a covenant to indemnify and save harmless from liabilities, the plaintiff can only recover such damages as he shows he has actually sustained.—Ewing et al. v. Reilly et al., 113.
4. *Negligence.*—A petition agatnst a railroad company for killing stock must

DAMAGES—*Continued.*

either allege that the injury was caused by the negligence or wilfulness of the defendant, or set forth such facts as show that it is liable under the statute, R. C. 1855, p. 649, § 5, "Damages," which is equivalent to the allegation of negligence. (See Brown v. Han. & St. Jo. R.R., 33 Mo. 309.) —West v. Han. & St. Jo. R.R., 177.

5. *Action—Negligence.*—In an action against a railroad company for negligently killing stock, the plaintiff must prove actual negligence, or such facts as impose a liability under the statute. (R. C. 1855, p. 649, § 5.) —Calvert v. Han. & St. Jo. R.R., 242.
6. *Warranty.*—In an action upon the warranty of title to a slave, if the slave's services were worth nothing, the vendee is entitled to recover the price paid, his costs and expenses in taking care of the slave, and also his costs in defending against the paramount title if he gave notice of the suit to his vendor.—Johnson v. Meyers' Exec'r, 255.
7. *Trespass.*—Where the defendant's horse and wagon by the carelessness and negligence of defendant's servant, and without any fault of the plaintiff, ran against and injured the horse of the plaintiff, standing in the street, the defendant will be liable to the plaintiff for the damage done. The measure of damage in such case will be the expenses of curing the horse of his injuries, the value of his services while being cured, and the difference between the value of the horse before the injury and after the cure.—Streett v. Laumier, 469.

DEPOSITIONS.

1. *Signing.*—The witness may signify his assent to his testimony as written, by subscribing his name as well at one place as at another.—Moss v. Booth, 316.
2. *Certificate.*—A justice's certificate at the end of a deposition, that the witness was sworn to testify the truth of his knowledge of the matter in controversy in the cause; that he was examined and his examination was reduced to writing, and subscribed by him in the presence of the justice, at the time and place in the notice annexed mentioned, complies with the statute. (R. C. 1855, p. 656, § 22.)—*Id.*
3. *Practice—Rules.*—Courts may adopt any rules of practice not in conflict with the law. There is no error in refusing to entertain formal objections to depositions, exceptions not having been filed within the time limited by rule of court.—Brooks v. Boswell, 474.

DIVORCE.

1. *Pleading.*—A petition for divorce, which states, in the words of the statute, that the defendant was, at the time of the marriage, and still is, impotent, and also adds the particular cause of impotency, is sufficient.—Kempf v. Kempf, 211.
2. *Pleading.*—One or two unconnected acts cannot be pleaded as showing that the plaintiff is entitled to divorce on the ground that the defendant has offered such indignities as to render his condition intolerable. One or more acts of drunkenness would not produce that condition, habitual drunkenness for the space of two years being one of the causes of divorce declared by the statute.—*Id.*

DOMICIL.

1. *Revenue.*—The personalty of a deceased is taxable in the domicil in which he resided at the time of his death, and not in that of his personal representative.—Stephens, Adm'r, v. The Mayor of Booneville, 323.

DOWER.

1. *Title.*—The widow is entitled to dower in the lands which her husband held under an inchoate title, although he may have conveyed it prior to the confirmation; and, to the extent of her dower, the widow is the representative of the claimant —Thomas v. Hesse et al., 13.
2. *Conveyance.*—Thomas v. Meier, 18 Mo. 573, affirmed.—*Id.*
3. *Conveyance.*—If the husband sell the land without the relinquishment of dower by the wife, she will be endowed in accordance with the law in force at the time of the husband's conveyance. Under the statute of 1825, the wife is not barred by the fact that the husband owed debts at the date of his deed or time of his death, unless the claims of the creditors be properly enforced. A third person cannot set up the debt as a bar to the action for dower.—*Id.*
4. *Action.*—Where the alienees of the husband have subdivided the land, which is held in several parcels, the dower of the widow shall be assigned in each parcel separately.—*Id.*
5. *Quarantine—Election.*—The widow electing to take a child's share, under the statute, R. C. 1855, p. 670, § 11, is to be considered as doweress, and is entitled to her quarantine until her share of the estate be properly assigned to her. If the rents of the mansion-house of the deceased, or of the plantation thereto belonging, be collected by the administrator, the widow is entitled to demand the same up to the date of the assignment of the dower by partition. (R. C. 1855, p. 670, § 21, and R. C. 1855, p. 166, § 14.)—Orrick and Wife v. Robbins' Adm'r, 226.
6. *Assignment—Partition.*—The setting off a child's share in partition to the widow is an assignment of dower.—*Id.*
7. *Messuage and Plantation.*—The widow is entitled to her quarantine of the whole of the farm or plantation upon which the mansion-house of the deceased was situated. If part of the same have been rented by the husband to a tenant, she is entitled to a share of the rents equal to her proportion of the estate until the expiration of the tenant's term; from that time she is entitled to the whole rent until dower be assigned. (R. C. 1855, p. 672, § 21.)—*Id.*

E

EJECTMENT.

See Conveyances. Lands and Land Titles. Wills.

1. *Judgment.*—In ejectment, a judgment for the recovery of land, to which the plaintiff did not show himself entitled, is erroneous.—Fenwick v. Gill, 194.
2. *Trespass on Close.*—An action of trespass on close can only be maintained where the plaintiff is in the actual or constructive possession of the land upon which the trespass is committed. If the defendant be in the actual possession, the remedy is by ejectment, in which action plaintiff may re-

EJECTMENT—*Continued.*

cover damages for the waste and injury, as also the rents and profits. (R. C. 1855, p. 692, § 13.) Bay, J., dissenting.—Cochran v. Whitesides, 417.

EQUITY.

1. *Trusts.*—An agent who buys with his own funds, at a public sale by third parties, the reversionary estate in the lands of his principal, will not be held a trustee for his principal unless he purchased under an agreement to that effect.—Kennedy v. Keating et al., 25.
2. *Specific Performance—Mistake.*—In a suit for the specific performance of a contract for the sale of land, a mistake in the description may be pleaded, and proved by either party.—Abbott v. Dunivin, 148.
3. *Injunction—Execution.*—Where an officer under an execution against A. seized personal property as belonging to A., which was replevied by B., and at the trial of the replevin judgment was given in favor of the officer against B. and his securities in the replevin bond for the full value of the property seized, and B. afterward procured from A. an assignment of the surplus fund remaining after paying the execution and costs; *held*, that B. had no equity to enjoin the officer from collecting the full amount of the judgment rendered in his favor. (Bay, J., dissenting.)—Hohenthal et al. v. Watson et al., 183.
4. *Life Estate—Remainderman.*—Where the owner of the life estate in personal property so deals with it as to endanger the estate of those in remainder, a court of equity will require the owner of such life estate to give security against loss to those in remainder.—Leweys' Curators v. , 367.
5. *Substitution.*—Where the owner of the life estate in a slave sold him for his full value, and took the note of the purchaser, a court of equity, upon application of those in remainder, will consider the note, or the proceeds thereof, as a substitution for such slave, and will cause the same to be secured for the benefit of the remaindermen.—*Id.*

ESTOPPEL.

See LANDLORD AND TENANT. JUDGMENTS. ADMINISTRATION, 6.

1. *Judgment—Record.*—Where the record of a judgment recovered in another State shows that the defendant voluntarily entered his appearance by attorney, he will not be permitted, in a suit upon the judgment, to disprove the authority of the attorney; the record is conclusive upon him. (Warren v. Lusk, 16 Mo. 102, affirmed.)—Baker v. Stonebraker's Adm'r, 172.
2. *Partition.*—If the proceedings and judgment in partition be absolutely void as to any one claiming an interest in the land, he cannot subsequently claim the benefit of the judgment, nor have any share of the proceeds of sale received by the other parties; if the judgment be void, it does not affect his title. (Gravier v. Ivory, p. 522.)—Ware's Adm'r v. Lisa, 505.
3. *Judgment—Fraud—Evidence.*—The defendant in the judgment is concluded thereby, and he cannot under the allegation that the judgment was obtained by fraud, re-open the issues determined by that judgment, and give testimony to impeach that given upon the trial.—Field et al. v. Sanderson's Adm'x, 542.

EVIDENCE.

1. *Larceny.*—Upon the trial of an indictment for larceny, evidence of the commission of a separate and distinct larceny from that charged is inadmissible.—State v. Goetz and Martin, 85.
2. *Practice.*—The rule in criminal cases, that if there be a reasonable doubt of the guilt of the defendant the jury should acquit him, has no application to civil suits.—Williams v. Watson, 95.
3. *Note.*—Where there have been mutual accounts between parties, the giving of a note by one to the other is *prima facie* evidence of a settlement of accounts between them.—Kinman v. Cannefax, 147.
4. *Covenant—Damages.*—In a suit upon the covenants of a deed upon a failure of title to part of the lands conveyed, a memorandum made by the grantors in the deed, showing the different tracts conveyed and the price per acre at which the lands were sold, which memorandum was by the defendants handed to the conveyancer as showing the lands sold and the consideration paid per acre therefor, is properly admitted in evidence, to show the damage sustained by the grantee.—Guinotte v. Chouteau et al., 154.
5. *Practice—Pleading.*—In an action of trespass *de bonts asportatis*, in which the petition alleges and the answer denies the ownership of the plaintiff, the defence, that the sale under which the plaintiff claims was made to defraud creditors, and was therefore void, need not be specially pleaded; and evidence supporting such defence is relevant to the issue made.—Greenway v. James, 326.
6. *Privileged Communications.*—The communications made by a party to one who generally acted as his attorney, but who, at the time the statements were made, was acting as attorney for other persons, are not privileged.—Wilson et als. v. Godlove et als., 337.
7. *Contract.*—But where the contract was implied from the circumstances of the case, and the party doing the work was in the employment of a third party by whom he was directed to do the work, it was error to exclude from the jury the evidence that he was directed by such third party to do such work without charge.—*Id.*
8. *Limitations.*—Where the plaintiff seeks to avoid the bar of the statute of limitations by proof of payments within the time limited, it is not necessary that the evidence of such payments should be in writing.—Inhabitants of Bridgeton v. Jones et al., 471.
9. *Criminal Practice.*—Upon the trial of a defendant for larceny, the fact that part of the stolen property was found upon the person of one who was engaged in a common design, aiding and abetting the defendant, is competent evidence.—State v. Wohlman, 482.
10. *Bond recitals.*—The value of the property attached, recited in the bond for its delivery, is *prima facie* evidence of the value against the obligors.—Weed v. Dills et al., 483.
11. *Crime—Sanity.*—It is a presumption of law that the party indicted for a crime is sane, and the burden of proof is upon the defendant to show that he was insane at the time of the commission of the crime charged.—State v. McCoy, 531.

EXECUTIONS.

See EQUITY, 3.

EXECUTIONS—*Continued.*

1. *Sale—Notice.*—The purchaser of personal property at a sale by a constable under execution, need only show a valid execution and a sale under it. Whether the constable gave the requisite notice of sale or not, will not affect the purchaser's title.—Hendrickson, Adm'x, v. St. Louis & Iron Mountain R.R. Co., 188.
2. *Return.*—A return to an execution not authenticated by the signature of the officer is not a proper return.—Bennett's Adm'x v. Vinyard, 216.
3. *Officer.*—In a suit against a constable, upon his liability at the common law for failing to return an execution from a justice delivered to him, the plaintiff must show the nature and amount of the damages he has sustained. The sum directed to be levied by the execution is not the measure of damages.—*Id.*
4. *Justices' Courts.*—The act relating to executions (R. C. 1855), excepting sections 34–43, does not apply to executions issued by justices of the peace; it applies only to writs issued by courts of record. Art. 8, § 23, and following, of the act relating to justices' courts, gives a remedy against the constable for failing to return an execution, but does not fix the sum specified in the writ as the measure of damages.—*Id.*
5. *Priority—Fraud.*—Where the plaintiff in an execution levied upon personal property, directs the sheriff to allow the defendant to retain possession, such execution will be constructively fraudulent and void as to subsequent executions levied upon the same property, which thereby obtain priority of payment.—Parker et als. v. Waugh, Sheriff, et als., 340.
6. *Setting aside—Practice.*—An execution was issued and levied upon real estate, but the property was not sold at the return term of the writ. At the second term after the return term, the real estate was sold by the officer and purchased by a junior judgment creditor. After the sale, the plaintiff moved the court to set aside the sale and return the money paid to the purchaser, which motion was sustained. *Held,* that the court erred in so doing.—Shouse v. Bailey et al., 151.

F

FORCIBLE ENTRY AND DETAINER.

1. *Possession.*—The party in actual possession of the premises, no matter how acquired, can maintain the action for a forcible entry and detainer, and his unlawful entry cannot be set off against an unlawful entry upon his possession; although the enclosures may have been removed, acts indicating the intention to hold will be sufficient to continue the possession.—King's Adm'r v. St. Louis Gas Light Co., 34.
2. *Evidence—Possession.*—When a witness, upon his examination in chief, stated that he was in possession of land and had transferred that possession to the defendant, the defendant upon the cross-examination has the right to inquire into the nature of that possession, and the circumstances attending it, so that the court and jury may know whether the witness be correct in the conclusion at which he arrived in stating that he was in possession.—Coates v. Hopkins, 135.
3. *Possession—Title.*—To authorize a recovery in the action for forcible entry

FORCIBLE ENTRY AND DETAINER—*Continued.*

and detainer, it must appear in evidence that the plaintiff has been ousted from his possession of the premises claimed, and that the defendant is himself in actual possession. The question of title cannot be inquired into.—Bell v. Cowan, 251.

4. *Possession.*—The entry upon a tract of land, and cutting timber thereupon, does not of itself constitute such a possession as to authorize an action of forcible entry and detainer.—*Id.*
5. *Tenant—Unlawful Detainer.*—In an action of unlawful detainer, for detaining possession of the premises demised after the expiration of the term, the tenant cannot set up as a defence the covenants of the landlord in the original lease to renew the term, and his refusal to comply with the covenant.—Finney v. Cist, 303.
6. *Judgment.*—It is the duty of the court to enter judgment for double the amount of damages assessed by the jury. (R. C. 1855, § 22, p. 791.)—Labeaume v. Nelson, 591.

FRAUDS, STATUTE OF.

1. *Defence.*—It is at the option of the parties to a parol contract, relating to the purchase and sale of land, to set up the defence of the Statute of Frauds.—Huffman v. Ackley, 277.
2. *Partners.*—An agreement between two parties to be partners in a sale of merchandise, need not be in writing.—Buckner v. Ries, 357.
3. *Trusts.*—The parol declaration made by a purchaser of land, held in trust by the vendor, that the vendor should hold the land for the benefit of the wife of the vendee, may be revoked at any subsequent period, and a devise of the land by the vendee to a third person operates as a revocation. (S. C. 28 Mo. 249.)—Kelly v. Johnson et als., 400.
4. *Landlord and Tenant—Tenants from year to year.*—Where a tenant enters into possession of premises under an agreement for a lease for years, which is void as not being in writing, he becomes a tenant from year to year. Although he pay the rent monthly, that does not constitute him a tenant from month to month, and he cannot quit possession at the end of any month, and thereby discharge himself from further payment of rent.—Scully v. Murray, 420.
5. *Contract—Consideration.*—A promise to pay the debt of another, although in writing, must be founded upon a sufficient consideration.—Cook v. Elliott, 586.

FRAUDULENT CONVEYANCES.

See ATTACHMENTS, 2, 4, 5.

G

GUARDIAN AND WARD.

See WITNESS.

1. *Settlements.*—The law presumes that a guardian who has made a final settlement of the estate of his ward, properly accounted for all the property which came to his possession as guardian.—Smith et al. v. Denny et al., 219.

H

HIGHWAY.

See CORPORATIONS, RAILROAD, 6, 7. DAMAGES.

HUSBAND AND WIFE.

1. *Practice—Separate Estate.*—In a suit to charge the separate estate of a married woman, she cannot appear and defend by attorney; and if she do thus appear, the judgment will be reversed for error. (Claflin v. Van Wagoner, 32 Mo. 252, affirmed.)—Fox v. Tooke et al., 509.

I

INJUNCTION.

See EQUITY. EXECUTION.

INTEREST.

1. *Note.*—A note for a certain sum, "with ten per cent. interest thereon till paid," carries interest from date. (Ayres v. Haines, 13 Mo. 252, qualified and explained.)—Pitzer's Adm'r v. Barret et al., 84.
2. *Usury.*—Merchants' Bank v. Sassee, 33 Mo. 350, affirmed. The banks of this State may, in discounting paper payable out of the county, charge a premium for exchange, without being guilty of usury.—Farmers' Bank v. Garten et al., 119.

J

JUDGMENTS.

1. *Civil Rights.*—The statute of this State which suspends all the civil rights of a party sentenced to the penitentiary for a term less than life, applies only to sentences by the State Courts.—Presbury v. Hull, 29.
2. *Assignment.*—The statute permitting assignments of judgments to be made upon the record applies only to judgments rendered by the courts of this State. The assignment of a judgment recovered in another State may be proven by a written instrument transferring to the plaintiff the equitable interest in the debt, and he may sue upon it in his own name.—Baker v. Stonebraker's Adm'r, 172.
3. *Record.*—Where the record of a judgment recovered in another State shows that the defendant voluntarily entered his appearance by attorney, he will not be permitted, in a suit upon the judgment, to disprove the authority of the attorney; the record is conclusive upon him. (Warren v. Lusk, 16 Mo. 102, affirmed.)—*Id.*
4. *Justices' Courts.*—Where a justice of the peace has jurisdiction of the parties and subject matter, and renders a judgment, the law presumes all the prerequisites necessary to the validity of the judgment. The errors of the justice must be corrected by a direct proceeding for that purpose, and cannot be set up in any collateral action.—Hendrickson, Adm'x, v. St. Louis & Iron Mountain R.R. Co., 188.
5. *Ejectment.*—In ejectment, a judgment for the recovery of land, to which the plaintiff did not show himself entitled, is erroneous.—Fenwick v. Gill, 194.
6. *Reversal.*—Where the judgment of the inferior court is reversed by the Supreme Court, the plaintiff in error or the appellant is to be restored to

JUDGMENTS—*Continued.*

all that he has lost by the original judgment, and this without any reference to the rights of the plaintiff in the original suit. Where the plaintiff, after the reversal of the judgment in his favor, voluntarily dismissed his suit, and the defendant sued for restoration of what he had lost by the judgment, an answer setting up the original claim of the plaintiff was properly stricken out.—Carson's Adm'r v. Suggett's Adm'r, 364.

7. *Practice—Continuance.*—The fact that the plaintiff in the original judgment has taken out execution thereupon and levied upon and advertised for sale the lands of the defendant situate within the jurisdiction in which the judgment was entered, affords no ground for a continuance of the suit upon such foreign judgment, as it shows no present defence to the action.—Field et al. v. Sanderson's Adm'x, 542.
8. *Fraud—Evidence.*—The defendant in the judgment is concluded thereby, and he cannot, under the allegation that the judgment was obtained by fraud, re-open the issues determined by that judgment, and give testimony to impeach that given upon the trial.—*Id.*
9. *Joint Contractors.*—A judgment against two of several joint debtors is no bar to a suit against the others.—Caldwell's Assignee v. Fitzpatrick et al., 276.

JURISDICTION.

See ADMINISTRATION, 2. COURTS, 2. JUSTICES' COURTS. JUDGMENT, 4.

1. *Justices' Courts.*—A plaintiff may give jurisdiction to a justice of the peace by entering a voluntary credit upon his cause of action.—Caldwell's Assignee v. Fitzpatrick et al., 276.

JURY.

1. *Jury.*—Foster v. Kirby, 31 Mo. 496; and Vaughan v. Scade, 30 Mo. 600, affirmed.—Aka v. Anderson, 74.

JUSTICES' COURTS.

1. *Appeals.*—The appellant from the judgment of a justice may file an amended affidavit and appeal bond in the appellate court.—Williams v. Watson et al., 95.
2. *Judgment.*—Where a justice of the peace has jurisdiction of the parties and subject matter, and renders a judgment, the law presumes all the prerequisites necessary to the validity of the judgment. The errors of the justice must be corrected by a direct proceeding for that purpose, and cannot be set up in any collateral action.—Hendrickson, Adm'x, v. St. Louis & Iron Mountain R.R. Co., 172.
3. *Appeals.*—Where the maker and endorser of a note are jointly sued, the former may take and file the appeal both for himself and his co-defendant.—Morgner v. Birkhead et al., 214.
4. *Executions.*—The act relating to executions (R. C. 1855), excepting sections 34–43, does not apply to executions issued by justices of the peace; it applies only to writs issued by courts of record. Art. 8, § 23, and following, of the act relating to justices' courts, gives a remedy against the constable for failing to return an execution, but does not fix the sum specified in the writ as the measure of damages.—Bennett's Adm'x v. Vinyard, 216.

JUSTICES' COURTS—*Continued.*

5. *Set-off.*—In a suit before a justice to a set-off filed by defendant, plaintiff may show part payment of the claim set up by defendant.—Savage v. Allen et al., 224.
6. *Statement.*—An account for goods sold, filed before a justice of the peace, is a sufficient statement of the cause of action.—Caldwell's Assignee v. Fitzpatrick et al., 276.
7. *Jurisdiction.*—A plaintiff may give jurisdiction to a justice of the peace by entering a voluntary credit upon his cause of action.—*Id.*

L

LANDLORD AND TENANT.

See FRAUDS, STATUTE OF, 4. FORCIBLE ENTRY AND DETAINER, 5.

1. *Detainer by Tenant.*—A tenant, holding under a lease for a definite period of years, which requires the landlord to pay the appraised value of the buildings erected by the tenant and remaining at the expiration of the lease, cannot hold over the possession after the term, on the ground that he has not been paid such value by his landlord, unless such authority be given by the terms of the lease. The tenant must seek his remedy by action upon the lease.—Speers v. Flack, 101.
2. *Lease.*—A lease of land, if no reservation be made, includes the improvements or buildings on the premises leased.—St. Louis Public Schools v. Hollingsworth, 191.
3. *Covenant for renewal.*—A covenant by the landlord to renew the lease for a second term, does not give the tenant a right at law to retain possession of the premises demised after the expiration of the original term. If the landlord refuse to comply with this covenant, the tenant has a remedy in equity, or in an action upon the covenants.—Finney v. Cist, 303.

LANDS AND LAND TITLES.

See EJECTMENT. CONVEYANCES. DOWER.

1. *Lands—Titles.*—Jones v. Soulard, 24 How. (U. S.) 41, affirmed.—Page v. Schmidt, 473.

LIMITATIONS.

1. *Adverse Possession.*—The entry and possession of one who enters upon land to hold for himself, with the expectation of procuring a preemption under the acts of Congress, is adverse to the real owner having the title.—Clemens v. Runckel, 41.
2. *Writs of Error.*—Writs of error must be brought within three years from the date of the rendition of the final judgment, without regard to the motion for a new trial.—Hamm v. St. Louis Public Schools, 181.
3. *Mortgage.*—Actual possession of the mortgaged premises by the mortgagee continued for twenty years, without any payment of interest to the mortgagor, or any thing done or said to recognize the mortgage as an existing encumbrance, will bar the equity of redemption. The rule applies with still greater force where the possession is by a stranger to the mortgage.—McNair et als. v. Lot et als., 285.

LIMITATIONS—*Continued.*

4. *Payments.*—Payment of portions of the principal or interest of a debt, made within the time of limitation, avoids the bar of the statute.—Inhabitants of Bridgeton v. Jones et al., 471.
5. *Evidence.*—Where the plaintiff seeks to avoid the bar of the statute of limitations by proof of payments within the time limited, it is not necessary that the evidence of such payments should be in writing.—*Id.*
6. *Error.*—The statute (R. C. 1855, Art. XIII, § 26, p. 1290) allows three years to a party in which to move to set aside a judgment of a court of record for irregularity.—Branstetter v. Rives et al., 318.

M

MANDAMUS.

1. *Right to Office.*—The right to an office cannot be determined upon an application for a *mandamus* to the Auditor of Public Accounts, directing him to issue to the relator a warrant for the salary, while another person holds the commission.—State, *ex rel.* Jackson, v. Auditor, 575.

MECHANIC'S LIEN.

1. *Title.*—In a suit under a mechanic's lien in St. Louis county, under the act of 1857, (Acts 1856-7, p. 668,) a judgment against the contractor will bind the property, and a sale will pass the title, although the owner be not party to the record. Those not made parties to the record may impeach the regularity of the proceedings.—Schaeffer v. Lohman et al., 68.
2. *Pleading—Parties.*—The owner of the building is not a *necessary* party to a suit to enforce a mechanic's lien, under the act relating to mechanic's liens in St. Louis county. (Acts 1856-7, p. 668, § 8.)—*Id.*
3. *Judgment.*—A general judgment against the owners of the building upon which a lien is filed for a debt of the contractor is erroneous.—Richardson v. George et al., 104.
4. *Practice—Pleading.*—In a suit to enforce a mechanic's lien under the statute, the petition must set forth the facts which show that the plaintiff has a lien and the right to enforce it. It must aver the filing of an account in the proper office, and the date of that filing; and if such averment be omitted, the petition is fatally defective upon motion in arrest of judgment. —Gault v. Soldani, 150.
5. *Parties—Pleading.*—The assignee of a mechanic's account and lien may sue without joining the contractor as party plaintiff. The assignee is a party to the contract contemplated by the statute. (Bates, C. J., dissenting.)—Goff v. Papin et als., 177.

MERCHANTS.

1. *Revenue.*—A tailor who keeps cloths, &c., which he makes up into clothing only for the personal use of his customers, is not a merchant, and is not required to take out a merchant's license. (Acts 1859, p. 53, § 1, 6.)—State v. West, 424.

MORTGAGE.

1. *Limitations.*—Actual possession of the mortgaged premises by the mortgagee continued for twenty years, without any payment of interest to the

MORTGAGE—*Continued.*

mortgagor, or anything done or said to recognize the mortgage as an existing encumbrance, will bar the equity of redemption. The rule applies with still greater force where the possession is by a stranger to the mortgage.—McNair et als. v. Lot et als., 285.

2. *Satisfaction.*—The assignee receiving payment of the debt or note secured by a mortgage or deed of trust, is the proper party to enter satisfaction upon the margin of the record, or execute the deed of release; and if he refuse so to do for thirty days after request, he will be liable to the penalty imposed by the statute. (R. C. 1855, p. 1091, § 22.) Bates, C. J., dissenting.—Ewing v. Shelton, 518.

N

NEGLIGENCE.

See CORPORATIONS, RAILROAD. DAMAGES. PLEADING. NUISANCE. HIGHWAYS.

O

OFFICERS.

See EXECUTIONS. SALARIES.

P

PARTITION.

1. *Assignment.*—The setting off a child's share in partition to the widow is an assignment of dower.—Orrick and wife v. Robbins's Adm'r, 226.
2. *Practice—Final Judgment.*—The judgment, that partition be made, is interlocutory only; the final judgment, from which an appeal lies, is the order of the court confirming the report of the commissioners, or directing a sale of the property. (R. C. 1855, p. 1122, § 68.)—Durham v. Durham's Adm'r, 447.
3. *Practice—Appeal.*—Where the judgment of the court is for a partition of the property, and directs that the land be sold by the sheriff, the judgment is final, and the appeal must be taken at the same term at which such judgment is entered. An appeal taken at the succeeding term after the confirmation of the sheriff's report of sale, is taken too late, and the appeal will be dismissed.—*Id.*
4. *Estoppel.*—If the proceedings and judgment in partition be absolutely void as to any one claiming an interest in the land, he cannot subsequently claim the benefit of the judgment, nor have any share of the proceeds of sale received by the other parties; if the judgment be void, it does not affect his title. (Gravier et als. v. Ivory et als., p. 522.)—Ware's Adm'r v. Lisa, 505.
5. *Pleading.*—A petition for partition which shows that the defendant is in the adverse possession of the premises sought to be divided, is defective on demurrer.—Gravier et als. v. Ivory et als., 522.
6. *Co-parcener—Fraud.*—The false and fraudulent representations made at a partition sale by one of the parceners or tenants in common will not affect his co-tenants, where he was not acting as their agent or representative.

PARTITION—*Continued.*

Such representations constitute no defence to an action by the sheriff against the purchaser for the amount of his bid. *Sed quære.* In a proper action, will not the party making such representations be liable to the purchaser for the injury done?—Matlock v. Bigbee et al., 345.

PARTNERSHIP.

1. *Mortgage—Note.*—The personal representative of a deceased partner cannot foreclose a mortgage or recover on the note given by one partner to secure a debt of the partnership.—Lindell, Ex'x, v. Lee et al., 103.
2. *Assignment.*—One partner has no power to make a general assignment of the partnership effects for the benefit of the creditors of the firm.—Hook v. Stone, 329.
3. *Agency—Power.*—A power of attorney from one partner to his co-partner, giving him authority to manage his individual business, and also to superintend the partnership business, to make such purchases as is usual to keep up the stock, and to renew notes in bank, will not authorize such co-partner to make a general assignment of the partnership property.—*Id.*
4. *Action.*—Where there is but one item of account unadjusted between partners, it may be settled in an action at law.—Buckner v. Ries, 357.
5. *Dissolution.*—The introduction of a new member into a partnership dissolves the pre-existing partnership, and puts an end to the joint powers of the partners; but, for the purpose of collecting the debts and settling the affairs of the concern, the partnership still exists.—Mudd et als. v. Bast et als., 465.
6. *Extra Services.*—Without an express agreement, one partner cannot charge the firm or his co-partner anything for the extra value of his personal services over those of his co-partner.—Bennett's Adm'r v. Russell's Adm'x, 524.

PAYMENT.

See ACCORD, 2.

1. *Agent.*—A, having a suit pending against B, made an assignment of so much of the proceeds as would satisfy a debt due by himself to C. B, after having received notice of the assignment, compromised with A and paid the money to the attorney of A, who applied the same according to the directions of A. *Held,* that although C had a right to control the suit, the attorney employed by A was not the agent of C, and that the sum paid was not a payment to C. (Ashby v. Winston, S. C., 26 Mo. 210.)—Ashby v. Winston et als., 311.
2. *Application.*—Payments made by a debtor are to be applied to debts due at the time of payment, rather than to those not due, unless he otherwise direct.—Cloney et als. v. Richardson, 370.

PRINCIPAL AND AGENT.

See PAYMENT, 1.

1. *Agency—Power.*—A power of attorney from one partner to his co-partner, giving him authority to manage his individual business, and also to superintend the partnership business, to make such purchases as is usual to keep up the stock, and to renew notes in bank, will not authorize such co-partner

PRINCIPAL AND AGENT—*Continued.*

to make a general assignment of the partnership property.—Hook v. Stone, 329.

2. *Road and Canal Fund—Bond.*—By the general law, R. C. 1855, p. 1363, the County Courts have no authority to apply any part of the road and canal fund to the purchase of a plank road already made by a corporation or individuals; it can apply the fund only to the construction and improvement of roads, bridges, or canals, and to no other object. Where the County Court assigned a bond, appearing upon its face to have been given for money borrowed of the road and canal fund in payment of an interest purchased in a plank road, the court exceeded its powers as an agent or trustee of said fund, and it was the duty of the assignee to see that the agent acted within its powers.—Rozier v. St. François County, 395.

PRACTICE, CIVIL.

PLEADINGS.

See DIVORCE, 1.

1. *Parties.*—The owner of the building is not a *necessary* party to a suit to enforce a mechanic's lien, under the act relating to mechanics' liens in St. Louis county. (Acts 1856-7, p. 668, § 8.)—Shaeffer v. Lohman et al, 68.
2. *Bond—Parties.*—Two or more joint obligees having a joint interest, must join as plaintiffs; but where the bond is taken to the State for the benefit of parties having separate interests, they need not be joined as parties to whose use the suit is brought. If the petition do not show the interest, the defect cannot be reached by demurrer or motion in arrest of judgment; but the joinder or nonjoinder may be taken advantage of at the trial.—State, to use of Young, v. Hesselmeyer et al., 76.
3. *Misnomer.*—The misnomer of the defendant does not avoid the process if he be served, and the defendant cannot in any collateral action take advantage of the error.—State, to use of Clay, v. Burtis et al., 92.
4. *Causes, several.*—A plaintiff having several causes of action may unite them in one suit, but must state the several causes in separate counts. If several causes of action be combined in one count, the error will be fatal on demurrer, or motion in arrest of judgment.—McCoy, Guard., v. Yager et al., 134.
5. *Admissions.*—It is too late to urge in the appellate court, after the parties have gone to trial upon the pleadings as presenting issues, that the matters were not in issue, but were admitted by the pleadings.—Bowman, Guard'n, &c., v. Stiles et al., 141.
6. *Trial.*—A party cannot be permitted at the trial to contradict the facts as set up by his pleading.—Bruce, to use of Pullis, v. Sims et al., 246.
7. *Admission.*—An answer to a petition upon a lost note, denying the execution of any such note as described, but stating that the defendant executed a note which by its description is the same as described in the petition, with an additional description, thereby admits the execution of the note sued upon.—*Id.*
8. *Mechanic's Lien.*—In a suit to enforce a mechanic's lien under the statute, the petition must set forth the facts which show that the plaintiff has a lien and the right to enforce it. It must aver the filing of an account in the proper office, and the date of that filing; and if such averment be omitted,

PRACTICE, CIVIL—PLEADINGS—*Continued.*

the petition is fatally defective upon motion in arrest of judgment.—Gault v. Soldani, 150.

9. *Petition—Contract.*—A petition alleging the delivery of railroad ties at a railroad, and that the defendants, who were contractors for building the road, received said ties, and converted them to their own use in the construction of the road, sufficiently sets forth a contract binding upon the defendants.—Miller v. Duff et al., 167.

10. *Mechanic's Lien—Parties.*—The assignee of a mechanic's account and lien may sue without joining the contractor as party plaintiff. The assignee is a party to the contract contemplated by the statute. (Bates, C. J., dissenting.)—Goff v. Papin et als., 177.

11. *Slave—Freedom.*—A petition filed by one held as a slave, praying leave to sue for his freedom *in forma pauperis*, is an *ex parte* proceeding, and cannot be treated as a pleading setting forth a cause of action which entitled the petitioner to a judgment. The petition or declaration must show upon what ground the plaintiff claims his freedom.—Joshua, (col'd,) v. Purse et al., 209.

12. *Surplusage.*—If the petition set forth a good cause of action at common law, other irrelevant allegations may be disregarded, or stricken out as surplusage.—Garner v. Hannibal & St. Jo. R.R. Co., 235.

13. *Evidence.*—In an action of trespass *de bonis asportatis*, in which the petition alleges and the answer denies the ownership of the plaintiff, the defence that the sale under which the plaintiff claims was made to defraud creditors, and was therefore void, need not be specially pleaded; and evidence supporting such defence is relevant to the issue made.—Greenway v. James, 326.

14. *Slave, transporting of.*—In a suit against a railroad corporation for the transporting a slave without the consent of his owner, it must be averred in the petition that the defendant is a railroad corporation in this State. (Local Acts 1855, p. 169.)—Welton v. Pacific R.R., 258.

15. *Note, Negotiable.*—A petition against the endorser of a negotiable note must set out the facts which in law make the note negotiable. (Jaccard v. Anderson, 32 Mo. 188, affirmed.)—Lindsay v. Parsons et al., 422.

16. *Amendment.*—Where different causes of action are severally set out in different counts in the petition, the dismissal as to one count is no amendment of the petition, and does not entitle the defendant to file another answer.—Weigand v. Schrick et al., 510.

17. *Partition.*—A petition for partition which shows that the defendant is in the adverse possession of the premises sought to be divided, is defective on demurrer.—Gravier et als. v. Ivory et als., 522.

CONTINUANCES.

18. *Practice.*—The act of May 15, 1861, forbidding the commencement of suits against all persons in the actual military service of the State, and requiring suits already commenced to be continued, is not in violation of that clause of the Constitution of this State forbidding all laws retrospective in their operation, where the cause of action originated after the passage of the law; nor is such an act void, as being a denial or delay of justice. Where, therefore, the defendant sued upon a note made after passage of the act,

PRACTICE, CIVIL—CONTINUANCES—*Continued.*

pleaded that at the commencement of the suit he was in the service of the State and asked to have the suit dismissed, it was error in the court to strike out that portion of the answer. The issue should have been tried, and if found true, the suit should have been dismissed.—Bruns et al. v. Crawford et al., 330.

19. *Foreign Judgment.*—The fact that the plaintiff in a foreign judgment has taken out execution thereupon, and levied upon and advertised for sale the lands of the defendant situate within the jurisdiction in which the judgment was entered, affords no ground for a continuance of the suit upon such foreign judgment, as it shows no present defence to the action.—Field et al. v. Sanderson's Adm'x, 542.

TRIALS.

See DEPOSITIONS. WITNESSES.

20. *Issue.*—The party alleging a fact is required to prove it.—Richardson v. George et al., 104.

21. *Evidence—Variance.*—The petition against the endorser of a negotiable note alleged due presentment and demand of payment; the evidence upon the trial showed that upon diligent inquiry the maker could not be found; *held*, that under the statute the variance was not material, the defendant not showing by affidavit that he was in any manner prejudiced thereby.—Wolf's Exec'x v. Lauman, 575.

22. *Rules.*—Courts may adopt any rules of practice not in conflict with the law. There is no error in refusing to entertain formal objections to depositions, exceptions not having been filed within the time limited by rule of court.—Brooks v. Boswell, 474.

23. *Evidence—Objections.*—The ground of objection to the admissibility of evidence must be stated in the bill of exceptions.—Miller v. Duff et al., 167.

24. *Negligence.*—Negligence and unskilfulness are matters of fact, and their existence is a question for the jury. A court cannot direct a jury that such or such supposed facts show, or do not show, negligence.—Huelsenkamp v. Citizens' Railway Co., 45.

25. *Evidence.*—The rule in criminal cases, that if there be a reasonable doubt of the guilt of the defendant the jury should acquit him, has no application to civil suits.—Williams v. Watson et al., 95.

26. *Witness—Party.*—If there be any evidence against a party defendant, the court has no power to submit his case to the jury separately, in order that he may be a witness for his co-defendants if acquitted.—Steamboat Prairie Rose v. Cross et al., 109.

27. *Instructions.*—Instructions must not assume the existence of the facts in issue before the jury.—Merritt et al. v. Given et al., 98.

28. *Instructions.*—An instruction must not determine an issue of fact.—Kinman v. Cannefax, 147.

29. *Instructions.*—Mere abstract propositions of law, not applicable to the evidence and particular case, are properly refused.—Huffman v. Ackley, 277.

30. *Instructions.*—An instruction should apply the proposition of law to the facts of the particular case.—Turner v. Loler, 461.

PRACTICE, CIVIL—TRIALS—*Continued.*

31. *Instructions.*—An instruction should not take from the jury the determination of the facts.—*Id.*

32. *Exceptions.*—The exceptions taken at the trial must be so preserved upon the record that the appellate court may see that the objections were presented to the inferior court.—Bowman, Guard'n, v. Stiles et al., 141.

33. *Bill of Exceptions.*—The bill of exceptions must set out the evidence as given at the trial, not the mere abbreviated notes or memoranda of the judge.—Rhodes v. Webb, 464.

AMENDMENTS.

34. *Pleading—Dismissal.*—Where different causes of action are severally set out in different counts in the petition, the dismissal as to one count is no amendment of the petition, and does not entitle the defendant to file another answer.—Weigand v. Schrick et al., 510.

NEW TRIALS.

35. *New Trial.*—The motion for new trial upon the ground of newly discovered evidence, must be supported by affidavits.—Leonard v. Schuler et al., 475.

36. *Setting aside Default.*—The party applying to set aside a judgment by default must show reasonable diligence in preparing for his defence, or a sufficient excuse for his omission to do so.—Palmer et al. v. Russell, 476.

37. *Motion to set aside Default—Affidavit.*—In an application to set aside a default and to be permitted to answer on the ground of a meritorious defence, the affidavit in support of the motion must show the exercise of proper diligence, and also set out the nature of the defence, so that the court may judge of the question of merits.—Lamb v. Nelson, 501.

38. *Default.*—The motion to set aside a judgment by default is addressed very much to the discretion of the inferior court.—Kribben v. Eckelkamp, 480.

39. *Affidavit.*—On a motion to set aside a judgment for irregularity, no affidavit of merits is necessary.—Branstetter v. Rives et al., 318.

JUDGMENT.

See JUDGMENTS. PARTITION. 2, 3.

40. *Mechanic's Lien.*—A general judgment against the owners of the building upon which a lien is filed for a debt of the contractor is erroneous.—Richardson v. George et al., 104.

41. *Prayer—Judgment.*—Upon a judgment by default, the relief granted by the judgment must accord with that prayed in the petition. (R. C. 1855, p. 1280, § 12.)—Abbott v. Dunivin, 148.

42. *Final Judgment—Appeal.*—A mere judgment "that defendant recover of the plaintiff his costs" is not a final judgment from which an appeal lies. (Young's Adm'r v. Stonebraker, 33 Mo. 117.)—Smarr v. McMaster's Adm'x, 204.

43. *Default.*—Where the plaintiff took a judgment by default, which was converted into a final judgment at the second term, and afterward, at such term, the court, upon the application of defendant, set aside the judgment and allowed him to answer, if the plaintiff do not save his exceptions to the

PRACTICE, CIVIL—JUDGMENT—*Continued.*

action of the court, or if he proceed with the action and go to trial upon the issues, he will be held to have waived his rights under the former judgment.—Greenway v. James, 326.

44. *Error—Irregularity.*—If a judgment by default in a suit not founded upon a bond, bill, or note, for the direct payment of money, be made final at the same term at which the default is entered, it will be irregular; but the defendant seeking to take advantage of the irregularity, must make his application by motion in the inferior court to set aside the judgment, and not by writ of error or appeal to the Supreme Court. (See Watson v. Welsh et al., 10 Mo. 454, *et supra* Branstetter v. Rives et al., 318.)—Lawther v. Agee, 372.

45. *Practice.*—Hohenthal v. Watson, 28 Mo. 360, affirmed.—Farley et al. v. Bryant, 512.

46. *Irregularity* —A judgment by default taken against a defendant before the time allowed by law to answer has expired is irregular, and a motion made at a subsequent term to set aside such judgment should be sustained. —Branstetter v. Rives et al., 318.

SUPREME COURT.

47. *Exceptions.*—The Supreme Court will not pass upon objections which were not presented and passed upon by the court below.—Boyse v. Burt, 74.

48. *Record.*—The transcript of the record must show what were the matters presented to the inferior court.—Carey v. Rainey, 134.

49. *Final Judgment—Appeal.*—No appeal lies until final judgment.—Forman's Adm'r v. Bashore's Adm'r, 245.

50. *Release of Errors—Pleading.*—A replication to a plea of release of error must deny or confess, and avoid the acts of release set up by the plea.—McCutcheon et al. v. Sigerson, 280.

51. *Reversal.*—The Supreme Court will not reverse a judgment for an error which did not injure the plaintiff in error, nor materially affect the merits of the action. (R. C. 1855, p. 1300, § 34.)—Johnson v. Armdall, 338.

52. *Motions—Error.*—The Supreme Court in reviewing the decisions of inferior courts on motions, does not require that the points of law determined should be specifically stated in the bill of exceptions, nor that a motion for a new trial should have been made.—Parker et als. v. Waugh, Sheriff, et als., 340

53. *Error—Plea in bar.*—If the defendant after the judgment against him compromise with the plaintiff, that matter must be pleaded to the writ of error in bar of the prosecution; and if the original plaintiff fail thus to plead, he cannot plead such matter in bar of a suit brought by the defendant, for restoration of what he lost by the original judgment.—Carson's Adm'r v. Suggett's Adm'r, 364.

54. *Verdict.*—Where the jury have passed upon a question of fact, the Supreme Court will not review the evidence for the purpose of determining in whose favor it preponderates.—Weber v. Degenhardt, 458.

55. *Setting aside Judgment.*—The Supreme Court will not interfere with the discretion of the inferior court in refusing to set aside a judgment after a trial at which the defendant failed to appear, except in a very plain case.—Brolaski et al. v. Putnam, 459.

PRACTICE, CRIMINAL.

See CRIMES. EVIDENCE.

1. *Election.*—Where a larceny of several articles of property is charged, the State may elect to prosecute for some and not for all.—State v. Donnegan, 67.
2. *Variance.*—Proof at the trial of the stealing of a gelding will support an indictment for the larceny of a horse.—*Id.*
3. *Instructions—Doubt.*—All that is required of the court is, that, in a suitable case for such an instruction, it should instruct the jury, that if upon the whole case they have a reasonable doubt of the guilt of the accused, they should acquit him. (State v. Dunn, 18 Mo. 419, s. d. 4, affirmed.)—State v. Crawford, 200.
4. *Slaves.*—In an indictment for dealing with a slave without the consent in writing of his owner or master, it is sufficient to allege a single instance of such dealing, as by the borrowing of money of such slave and the giving him a note therefor. (R. C. 1855, p. 1477, § 33.)—State v. Rohlfing, 348.
5. *Indictment—Perjury.*—If an indictment for the crime of perjury (R. C. 1855, p. 599, § 1) show that the issue, as to which the defendant testified, was not, as a matter of law, a material issue in the cause, it is defective and is properly quashed.—State v. Bailey, 350.
6. *Larceny — Possession of Stolen Property—Evidence.* — The possession of recently stolen property is presumptive evidence of guilty possession, and if unexplained by direct evidence, or by the attending circumstances, or by the character of the possessor, is taken as conclusive; but what is to be regarded as a recent possession depends so much upon the character of the property stolen and the circumstances surrounding each particular case, that no general rule can be laid down applicable to all cases alike.—State v. Bruin, 537.

REVENUE.

See CORPORATIONS, MUNICIPAL. MERCHANTS. CONVEYANCES.

1. *Domicil.*—The personalty of a deceased is taxable in the domicil in which he resided at the time of his death, and not in that of his personal representative.—Stephens, Adm'r, v. The Mayor of Booneville, 323.

SALARIES.

1. *Convention Ordinance.*—The ordinance of the Convention of October 16, 1861, reduced the salaries of the officers therein named, for the year ending September 1, 1862. The reduction was absolute, and not a mere withholding for a time of a portion to be made up afterwards.—State, *ex rel.* Miller, v. Auditor, 503.
2. *Officers.*—The total compensation the judge of the St. Louis Land Court is entitled by the acts of the General Assembly is three thousand dollars for a year.—State, *ex rel.* Lord, v. St. Louis Co. Court, 530.

SALES.

See CONTRACTS.

SECURITIES.

1. *Contract.*—Where a surety, with his principal, makes a direct and absolute promise to pay, depending upon no condition expressed in the writing, he

SECURITIES—*Continued.*

may be sued without any previous demand upon the principal.—Carr et al. v. Card et al., 513.

2. *Discharge.*—To discharge the security, there must be such an express or implied agreement between the principal debtor and the creditor, to extend the time of payment, as to prevent the creditor suing at once upon the original obligation.—Weller v. Ranson et al., 362.

3. *Administration—Judgment.*—Where the administrator and his securities on his official bond are proceeded against under the provisions of secs. 14 and 15, of Art. V. of the administration act, (R. C. 1855, p. 162,) for the refusal of the administrator to pay money in accordance with the order of the County Court, the defendants cannot be permitted to show that the administrator had no funds in hand applicable to the demand. The administrator is bound by the judgment of the County Court, and its action cannot be controverted in any collateral proceeding. The securities are also precluded by the conditions of the bond executed by them. (State to use of Griffith v. Holt, 27 Mo. 340, affirmed.)—Taylor v. Hunt's Exec'r, 205.

SLAVES.

1. *Freedom—Pleading.*—A petition filed by one held as a slave, praying leave to sue for his freedom *in forma pauperis*, is an *ex parte* proceeding, and cannot be treated as a pleading setting forth a cause of action which entitled the petitioner to a judgment. The petition or declaration must show upon what ground the plaintiff claims his freedom.—Joshua, (col'd,) v. Purse et al., 209.

TRESPASS.

See CORPORATIONS, RAILROAD. DAMAGES.

TRUSTS.

See STATUTE OF FRAUDS.

1. *Equity—Agent.*—An agent who buys with his own funds, at a public sale by third parties, the reversionary estate in the hands of his principal, will not be held as a trustee for his principal unless he purchased under an agreement to that effect.—Kennedy v. Keating, 25.

2. *Administration.*—Where a party, acting as executor *de son tort*, procures a lease of premises which had been previously held by his testator, but which had been forfeited for non-payment of rent, he will hold the property as trustee for the benefit of the distributees or representatives of the deceased.—Engel's Adm'r v. Bernicker & Wife, 93.

VENDORS AND PURCHASERS.

See CONTRACTS. DAMAGES.

1. *Vendor's Lien.*—The vendor of land who has given his bond for a conveyance upon full payment of the notes given for the purchase money, cannot be required to convey to an assignee of the vendee until the purchase money be paid, although he may have given up the notes and have accepted a new note from the vendee with collateral security.—Johnson v. Scott et al., 129.

2. *Fraud.*—If the vendor of land fraudulently misrepresents to the purchaser the condition of the land so as to induce the purchase, or fraudulently

VENDORS AND PURCHASERS—*Continued.*

conceal facts material to the purchaser, or use any artifice to mislead him as to its condition, the vendor will be liable to the purchaser for the damages sustained caused by such misrepresentation, concealment, or artifice.—McFarland v. Carver, 195.

WILLS.

1. *Devise.*—A will made in 1824, and properly attested, provided as follows: "I do nominate and appoint for my sole and only heir of all the goods, chattels, rights and credits, and effects, which I shall be possessed of at the time of my death, I do bequeath the whole unto my adopted child Sophia," &c., "to inherit and enjoy all and singular the said goods, chattels, rights, credits and effects which I shall be possessed of at the time of my death." *Held*, that real estate did not pass by the will.—Bowlin v. Furman, 39.

WITNESSES.

See DEPOSITIONS. EVIDENCE. PRACTICE.

1. *Practice—Party.*—If there be any evidence against a party defendant, the court has no power to submit his case to the jury separately, in order that he may be a witness for his co-defendants if acquitted.—S. Bt. Prairie Rose v. Cross et als., 109.
2. *Guardian and Ward.*—The ward is a competent witness for the guardian, to prove an indebtedness due to the latter on account of the estate of the ward in his hands. The ward is not a party to the action, nor is the suit prosecuted for his immediate benefit.—Bowman, Guard'n, &c., v. Stiles et al., 141.
3. *Conveyance.*—The grantor or vendor of property is not a competent witness to alter, change, or qualify the effect or terms of the instrument of conveyance.—Bruce, to use of Pullis, v. Sims et al., 246.
4. *Interest.*—Interest, in the event of the action, disqualifies not a witness, unless he be a party to the action, or one for whose immediate benefit it is prosecuted. (R. C. 1855, p. 1576, § 1, 6.)—Mudd et als. v. Bast et als., 465.